

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

JULIUS DARNELL ROBERTS,
Defendant.

No. CR-02-0282-FVS

ORDER GRANTING MOTION FOR
RECONSIDERATION, VACATING
ORDER DENYING PETITIONER'S
SECTION 2255 MOTION, AND
DIRECTING PLAINTIFF TO FILE
RESPONSE TO DEFENDANT'S
SECTION 2255 MOTION

THIS MATTER came before the Court on Petitioner's motion for reconsideration of the Court's order finding his Section 2255 petition time barred. (ECF No. 208). Petitioner is proceeding pro se. Respondent is represented by Stephanie A. Van Marter.

DISCUSSION

On August 3, 2012, Petitioner filed a petition for habeas relief challenging his December 18, 2009 re-sentencing. (ECF No. 206). On August 31, 2012, the Court denied the petition as untimely. (ECF No. 207). Petitioner now moves for reconsideration of that order. (ECF No. 208).

Under Fed.R.Civ.P. 59(e), a motion for reconsideration should not be granted, absent highly unusual circumstances, "unless the Court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999).

1 On reconsideration, Petitioner attaches evidence not previously
2 presented to the Court and argues that this Court has committed clear
3 error by finding the petition time barred. Petitioner provides
4 documentation which indicates the United States Supreme Court
5 extended the time for Petitioner to file a petition for writ of
6 certiorari up to and including August 1, 2011. (ECF No. 208, Exh.
7 A). The Court previously concluded that Petitioner had only until
8 June 6, 2011, to file a petition for a writ of certiorari.¹

9 Section 2255 imposes a one-year statute of limitations on a
10 section 2255 motion. 28 U.S.C. § 2255(f). The limitations period
11 begins to run from "the date on which the judgment of conviction
12 becomes final." 28 U.S.C. § 2255(f)(1). A conviction becomes final
13 by the conclusion of direct review or the expiration of the time for
14 seeking such review by certiorari. *Bowen v. Rowe*, 188 F.3d 1157,
15 1158-1159 (9th Cir. 1999). The Ninth Circuit has held that "the
16 period of 'direct review' in 28 U.S.C. § 2244(d)(1)(A) includes the
17 period within which a petitioner can file a petition for a writ of
18 certiorari from the United States Supreme Court, **whether or not the**
19 **petitioner actually files such a petition.**" *Id.* (emphasis added).
20 Based on the newly presented documentation, it is apparent that
21 Petitioner had been granted an extension of time and was permitted to
22

23
24 ¹Petitioner's direct appeal regarding the December 18, 2009
25 re-sentencing was denied on March 8, 2011. (ECF No. 190).
26 Because Petitioner did not previously inform the Court that he
requested and was granted an extension of time to file a petition
for a writ of certiorari, the Court determined that the period
began to run on June 6, 2011, 90 days later. See *Bowen v. Rowe*,
188 F.3d 1157.

1 file a petition for writ of certiorari by August 1, 2011. (ECF No.
2 208, Exh. A). Petitioner thus had until August 1, 2012, not June 6,
3 2012, to file a timely section 2255 motion.

4 The petition was not filed until August 3, 2012; however, the
5 petition was submitted by the pro se petitioner in July of 2012.
6 (ECF No. 206). Pursuant to the mail-box rule, Petitioner's section
7 2255 motion was timely. Accordingly,

8 **IT IS HEREBY ORDERED:**

9 1. Petitioner's motion for reconsideration (**ECF No. 208**) is
10 **GRANTED**.

11 2. The Court's order denying the petition as untimely (ECF No.
12 207) is **VACATED**.

13 3. The government shall file a **response** to Petitioner's Section
14 2255 Motion (ECF No. 206) on or before **October 26, 2012**, and serve
15 the same on **Petitioner**. See Rule 4(b), Rules Governing Section 2255
16 Proceedings For the United States District Courts.

17 4. Petitioner shall file a reply, if he so chooses, by no later
18 than **November 16, 2012**.

19 5. Petitioner's Section 2255 Motion shall be noted for hearing,
20 without oral argument, on **November 30, 2012 at 6:30 p.m.**

21 **IT IS SO ORDERED.** The District Court Executive shall enter this
22 order and furnish copies to Petitioner and to counsel.

23 **DATED** this 19th day of September, 2012.

24 S/Fred Van Sickle
25 Fred Van Sickle
26 Senior United States District Judge